Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 73-2027

LOU V. BREWER, Warden at Iowa State Penitentiary, REV. SHERBOURNE RAY, Protestant Chaplain at the Iowa State Penitentiary; FATHER GERALD HOENIG, Catholic Chaplain at the Iowa State Penitentiary,

Petitioners,

vs.

MICHAEL D. REMMERS, Ordained Revelation Minister in the CHURCH OF THE NEW SONG, and Coadjutor of Local Purlieu T.R.U.T.H. and

ROBERT LONEY, Ordained Revelation Minister in the CHURCH OF THE NEW SONG and Special Envoy to the Bishop of Tellus,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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LOU V. BREWER, Warden at Iowa State Penitentiary, REV. SHERBOURNE RAY, Protestant Chaplain at the Iowa State Penitentiary; FATHER GERALD HOENIG, Catholic Chaplain at the Iowa State Penitentiary,

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ROBERT LONEY, Ordained Revelation Minister in the CHURCH OF THE NEW SONG and Special Envoy to the Bishop of Telius,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners, officials at the Iowa State Penitentiary charged with the administration of the maximum security institution for the State of Iowa under the direction of Iowa's Department of Social Services, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on April 16, 1974.

OPINIONS BELOW

The opinion of the United States District Court, *Remmers, et al. v. Brewer, et al.* reported at 361 F.Supp. 537 (S.D. Iowa, 1973) was timely appealed to the United States Court of Appeals for the Eighth Circuit. The opinion of the Court of Appeals, which is the basis for this petition, is reported at 494 F.2d 1277 (8th Cir., 1974).

JURISDICTION

On the 16th day of April, 1974, the Court of Appeals for the Eighth Circuit filed its Opinion and Judgment. The jurisdiction of this Court is invoked under Title 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

1. Whether the District and Circuit Courts applied an incorrect standard in determining whether the Church of the New Song is a valid religion for First Amendment purposes and in determining on the evidence whether Respondents' beliefs are sincerely held.

2. Whether the Respondents should be treated separately from Protestant Denominations at the Iowa State Penitentiary.

CONSTITUTIONAL PROVISIONS

Constitution of the United States, First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

The Respondents, Plaintiffs below, on August 3, 1972, filed a pro se complaint, later amended, alleging violations of the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution by Iowa State Penitentiary (Fort Madison, Iowa) officials. The action was brought pursuant to 42 U.S.C., §1983. The Complaint alleged that the Respondents, as members of the Church of the New Song (CNS), were being denied the right to practice their religion equally with others at the Penitentiary, in violation of the First Amendment. They further complained that certain practices of the Diagnostic Committee at the Penitentiary, which forwards reports to the Parole Board, violated the Establishment Clause of the First Amendment.

On July 24, 1973, the District Court for the Southern District of Iowa, by the Honorable William C. Hanson, entered Judgment. The District Court found that the Petitioners' were to grant to CNS members at the Penitentiary the right to exercise their religion equally with other religions and that the "Plaintiffs must be allowed the same rights of assembly, discussion, correspondence, ministerial visits, devotional facilities, etc. which are enjoyed by Protestant and Catholic inmates." (361 F.Supp. at 542).

The District Court dismissed the portion of the Respondents' claim challenging the involvement of the prison chaplains in the Diagnostic Committee reports. (361 F.Supp. at 543).

The Petitioners appealed from that portion of the Order mandating equal treatment on July 30, 1973, and the Respondents appealed from the dismissal of the chaplaincy question on July 31, 1973. The Circuit Court affirmed the District Court decision on April 16, 1974, simply stating that the findings of the lower court were not clearly erroneous and that no error of law appeared. (494 F.2d at 1278).

The facts brought out at the District Court hearing were as follows:

(1) Respondents Michael Remmers and Robert Loney were, at the time of the commencement of this action, both inmates of the Iowa State Penitentiary at Fort Madison, Iowa, a maximum security institution.[1]

(2) In early 1972, Respondent Remmers approached Petitioner Ray. the Protestant Chaplain and person charged with coordinating all non-Catholic services at the Penitentiary, about a new "religion" which Remmers called The Religious Understanding To Hope (TRUTH). (Tr. p. 121, p. 205). Remmers was attempting to form a "church" and wished to use prison facilities. He was told by Ray that he could not do so (Tr. p. 205). Approximately a month later Remmers again approached Ray, but this time concerning the Church of the New Song (CNS) with which TRUTH had apparently now decided to affiliate (Tr. p. 121-122, Tr. p. 205-206). Ray again stated that the facilities would not be available for "religions" having their beginnings in the pentitentiary (Tr. p. 206).[2]

(3) Later in 1972, both Respondents Remmers and Loney approached Warden Lou Brewer and Loney presented Warden Brewer with a purported petition from those wishing to attend Church of the New Song meetings. The group was seeking meeting times and places separate from services provided for Catholics and Protestants (Tr. p. 14). Warden Brewer denied the group the right to hold formal meetings in the Penitentiary.

(4) Respondents, at the time they approached the Penitentiary officials, had little information concerning the Church of the New Song, other than some newspaper articles and a synopsis of the religion written by a Federal prisoner (Tr. p. 26-27; p. 122).

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[1] Remmers, prior to his recent parole, was serving a term for robbery with aggravation while Loney is serving a sentence for first degree murder.

[2] A memo, dated March 8, 1972, from Petitioner Ray to Petitioner Hoenig (the Catholic Chaplain) concerning TRUTH is in evidence as Respondents' Exhibit No. 13 (Tr. p. 218).

(5) There is no dispute that the CNS movement was founded within the Atlanta Federal Penitentiary, primarily by one Harry Theriault, Federal prisoner, and now Bishop of CNS. See *Theriault v. Carlson,* 339 F.Supp. 375 (N.D. Ga. 1972), vacated and remanded by *Theriault v. Carlson,* 5th Cir., June 10, 1974.

(6) The basic tenets of the Church of the New Song were explained at hearing by Respondents Remmers and Loney, Richard Tanner, Prime Coadjutor of CNS, and Stephen Fox, International Chancellor of Information of CNS. Respondent Loney stated that CNS is "founded on the belief of Eclat-that's our name for God. He is everywhere and he's wanting to burst forth like a light, like a big flash." (Tr. p. 17) Church of the New Song members denote themselves Eclatarians and speak of the age of Eclatarianity as the age "of the new kingdom where the people will be cognizant of right and wrong. THEY WILL NOT HAVE TO BE RULED BY A GOVERNING POLICE CLASS." (Tr. p. 84).

(7) As to tenets of what is right and wong, however, Richard Tanner stated that the basic and fundamental doctrine of the Church of the New Song is that anything which is right in any religion known to humanity is right in CNS. HE STATED THAT CNS DOES NOT HAVE DICTATES AND THAT ESSENTIALLY A PERSON MAY BELIEVE WHATEVER HE WISHES. (Tr. p. 89-90).

(8) Although Becky Hensley, a Sealed Revelation Minister, Doctor of Eclatarianity and Envoy International of the Church of the New Song, stated that she could not discuss whether CNS could be considered a Protestant sect (Tr. p. 157), other witnesses stated that CNS was not a Protestant sect in the sense that it would meet with other Protestants (Tr. p. 160-161).

(9) Several witnesses testified that other "purlieus" (congregations) of CNS members existed both within and without penal institutions although only members from Iowa City and the Penitentiary appeared at hearing.

(10) Although being denied gathering in formal group meetings, the evidence at hearing showed that Church of the New Song devotees at the Penitentiary were allowed CNS literature, were allowed to wear religious symbols and to correspond and visit with other followers of Theriault (Tr. p. 122-123; p. 72-73; p. 76). No evidence was offered of any disciplinary action taken for membership in the Church of the New Song.

REASONS FOR GRANTING THE WRIT

I. THERE ARE HIGHLY IMPORTANT CONSTITUTIONAL QUESTIONS INVOLVED WHICH HAVE AN IMPACT UPON THE ADMINISTRATION OF ALL FEDERAL AND STATE CORRECTIONAL INSTITUTIONS.

II. THE COURTS BELOW APPLIED NO STANDARDS OR CRITERIA IN DETERMINING WHETHER THE CHURCH OF THE NEW SONG IS A RELIGION AND WHETHER RESPONDENTS POSSESSED A SINCERE AND GOOD FAITH BELIEF IN THAT CREED, CONTRARY TO RULES ESTABLISHED BY THIS COURT. [*United States v. Seeger*, 380 U.S. 163 (1965); *Wisconsin v. Yoder*, 406 U.S. 205 (1972)].

III. SINCE THE FILING OF THE OPINION IN THIS CAUSE BY THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT, THE FIFTH CIRCUIT VACATED AND REMANDED THE CASE PARALLELING FACTS AND FINDINGS IN THIS CASE AND EXTENSIVELY REFERRED TO BY THE DISTRICT COURT AS ECHOED BY THE EIGHTH CIRCUIT, CREATING A CONFLICT BETWEEN CIRCUIT COURTS. [*Theriault v. Carlson*, 339 F.Supp. 375 (N.D. Ga. 1972), vacated and remanded, 5th Circuit, June 10, 1974, See Appendix A].

A

THE CHURCH OF THE NEW SONG IS NOT A RELIGION AND IN FINDING AS THEY DID THE DISTRICT AND CIRCUIT COURTS FAILED TO APPLY ESTABLISHED TESTS SET FORTH BY THIS COURT TO DETERMINE WHETHER THERE IS A CONSTITUTIONALLY PROTECTED RELIGIOUS BELIEF.

The Petitioners here assert that an incorrect standard was applied in the District Court in determining whether the Church of the New Song (CNS) is a valid religious belief for First Amendment purposes. As Justice Harlan stated in concurring in *Walz v. Tax Commission,* 397 U.S. 664, at 699-700 (1970):

> "It is always possible to shrink from a first step lest the momentum will plunge the law into pitfalls that lie in the trial ahead. I, for one, however, do not believe that a 'slippery slope' is necessarily without a constitutional toehold. Like the Chief Justice, I am of the view that it is the task of this tribunal to 'draw distinctions, including fine ones, in the process of interpreting the Constitution.' "

The District Court, while for the most part enunciating the correct standards, completely failed to apply those standards and in fact applied an unworkable standard. Actually, the standard which was applied was no standard at all.

The Petitioners' argument in the District Court that in a prison context some initial showing of legitimacy is required for Free Exercise Clause protection is neither "broad" nor "novel".[3](361 F.Supp. at 541). The District Court recognized this in finding that

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[3] By "legitimacy" Petitioners do not and have not had reference to the truth or falsity of the Respondents' beliefs. The term has reference only to the legitimacy of the Respondents' claim to First Amendment protection as a "religion".

the Respondents have "made a prima facie showing of legitimacy" and in stating that the "relevant inquiry is whether or not the Church of the New Song is a religion and whether the Respondents possess a sincere and good faith belief in that creed." Had that showing been made to Iowa State Penitentiary officials, the initial showing of legitimacy would have been present. The Petitioners submit that the showing was never made and that in fact the District Court, while purporting to apply that standard, never required any such showing to be made at the trial.

The Court stated at 361 F.Supp. 540:

> "The primary bond between Church of the New Song members appears to be their belief in an inanimate and supreme force or spirit called Eclat, which they believe pervades all things. [It is on the evidence the only bond and there was no agreement other than the use of the term 'Eclat'.] The Eclatarians apparently believe that Eclat is a unifying and harmonizing spirit which unites all men in brotherhood. [No evidence of this apparent belief is present.] Thus Eclat may be seen to occupy roughly the same relative position in the Eclatarian faith, as the Christian God or Hinduism's Brahma. [Again there is no support for this claim on the record.] Eclatarians view Jesus and other Christian figures as great teachers and spiritual leaders who are nonetheless subordinate to Eclat. [No comparison to 'Eclat' was made although one witness, Stephen Fox, stated Jesus was viewed as a prophet (Tr. p. 158) and not to be compared to anyone (Tr. p. 159).]"[4]

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[4] The court also stated, at 361 F.Supp. 541: "Dr. Stephen Fox, a member of the church and a professor of psychology, testified as to the rehabilitative effects of Eclatarianism on prison inmates in particular and on people in general." One may read and re-read Dr. Fox's transcribed testimony and find no such testimony. (Tr. pp. 158-164).

The Court went on to state, however, at 361 F.Supp. 541:

> "While there is no recognized body of dogma for the Eclatarian faith and each member of the Church is apparently free to embrace or reject whatever portions of Eclatarian teaching he or she wishes, the only absolute requirement for membership being a firm belief in Eclat."

Indeed the court reached the heart of the CNS belief in finding that one need only believe and practice whatever one wishes to believe and practice. Ample support for this finding appears on the record.[5]

The Petitioners believe that the Courts below in effect applied no standard at all to determine whether the burden of establishing a prima facie case that CNS was a religion had been met. Rather, the Courts established two criteria which had nothing to do with the requisite prima facie test, whether CNS was a religion and whether the Respondents possessed a sincere and good faith belief in the religion. The District Court's misplaced criteria were (1) the decision in *Theriault v. Carlson,* 339 F.Supp. 375 (1972) which, as later found by the Fifth Circuit, used no standard (See Appendix A); and (2) that the followers of Theriault profess to be nonviolent. Based upon these incorrect criteria, the Court held then that the anxieties in those regards were unsubstantiated by the record.

The Petitioners readily admitted that they did not allow the Church of the New Song (CNS) to meet at the Iowa State Penitentiary as they sincerely felt the CNS had not made the necessary showing to them that it was a bona fide religion. However, in doing so, the Petitioners have never asserted that the Respondents had lost their right to free exercise of their beliefs or their religion due to the fact that they were convicted felons. The Petitioners do

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[5] Loney, Tr. p. 29; Tanner, Tr. pp. 63, 75, 77, 84, 88-89; Fox, Tr. p. 159.

assert that some showing of legitimacy is required before a group claiming to be a religion is entitled to meet at the Iowa State Penitentiary. In this assertion, the Petitioners are supported by ample precedent.

Before holding that the Black Muslim religion was protected by the First Amendment, the courts looked at the legitimacy, as a religion, of that group to determine its right to free exercise. *Long v. Parker,* 390 F.2d 816 (3 Cir. 1968); *Banks v. Havener,* 234 F.Supp. 27 (E.D. Vir. 1964); *Sostre v. McGinnis,* 334 F.2d 906 (2 Cir. 1964); *Sa Marion v. McGinnis,* 253 F.Supp. 738 (W.D. N.Y. 1968).

In *Cruz v. Beto,* 405 U.S. 319 (1972), the Court, faced with the claims of a Buddhist, stated:

> "If Cruz was a Buddhist and if he was denied a reasonable opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was probably discrimination by the State against the Buddhist religion, established 600 B.C., long before the Christian era."

The Courts here found only a belief in "Eclat" was sufficient to grant the same rights to "Eclatarians" that Catholic and Protestant worshippers enjoy -- namely the right to congregate in a maximum security institution. The Petitioners believe that more careful scrutiny of alleged religious beliefs to determine whether they are legitimate or bona fide beliefs in a religious sense is essential in such a maximum security setting. In this regard any statement that the religious activities may be curtailed if the Church of the New Song should prove to be a hoax or a front (361 F.Supp. 543, 494 F.2d 1278) does nothing to meet the standards which the Court should have required be met by the "religion" in the first place. Coupled with the requirement that the State must now present a compelling interest to justify future curtailment of meetings (361 F.Supp. 542) the "power vested in prison authorities to take reasonable precautions to prevent potential abuses" (361 F.Supp. 543) is all but

meaningless.[6] That standard is unenforceable by prison authorities.

It would seem clear that in addition to relying on the fact that its anxieties were as yet unsubstantiated as to the political posture of CNS, the District Court relied to a great extent on *Theriault v. Carlson*, 339 F.Supp. 375 (N.D. Ga. 1972). It is interesting to note that as subsequently found by the Fifth Circuit in *Theriault*, the court rejected all pretense of the traditional prima facie tests and later stated that the court could not "say under the First Amendment what is or is not a worthy religion, the question being ultimately not one for debate or proof so much as one of faith and conscience." [*Theriault v. Carlson*, 353 F.Supp. 1061, at 1063 (N.D. Ga. 1973)] The court in *Theriault*, at 339 F.Supp. at 382, further said that "[o]ne of the purposes of the First Amendment was to prohibit the imposition of any standard as a prerequisite to the free exercise of religion." In other words, the court might be saying that at a maximum security institution, two or more need only say they are a religion which requires congregation, and they are therefore entitled to congregate.

However, the lower court in *Theriault* did more. It found, at 339 F.Supp. 375, that CNS began at the Atlanta Federal Penitentiary as a "game". Now, however, it is a "religion".

Most religions desire to be formally bound together by incorporation as a religious group, but CNS abandoned incorporation plans at the specific request of Bishop Theriault (Tr. p. 269). Most religions point to some prophet or founder whose beliefs they espouse, but here, the Respondents and other witnesses who profess to be followers of CNS, although acknowledging that co-founder Theriault, Plaintiff in *Theriault v. Carlson*, 339 F.Supp. 375, and in the contempt action that followed, *Theriault v. Carlson*, 353

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[6] Indeed prison administrators view the "power" vested in them to prevent potential abuses as a "public duty".

F.Supp. 1061 (N.D. Ga. 1973), is considered to be a spiritual leader, are at the same time free to accept or reject his pronouncements. (Tr. p. 77).

The significance of the lower court *Theriault* decisions in the present matter in moving the court away from the tests and standards it purported to apply is clear. The Iowa District Court, at 361 F.Supp. 540, echoing *Theriault,* stated that the concept of "religion . . . is to be given a wide latitude in order to insure that state approval may *never* become a prerequisite to the practice of one's faith." (Emphasis supplied) The court later also states, at 361 F.Supp. 542:

> "The court is well aware of the possibility that the Church of the New Song may be only a sham religion created to serve as a convenient vehicle for the presentation of political claims. But the as yet unsubstantiated anxieties of this court cannot justify the *possible* suffocation of religious freedoms." (Emphasis supplied)

That statement stands as eloquent testimony to the Court's failure here to decide, as it states it has done, whether CNS is a religion and, if so, whether the Respondents' beliefs are sincere. There is no doubt that Petitioners refused to let this group meet as they say they must. If this is a religion and their beliefs are sincere how is it only "possible" that their free exercise has been curtailed.

The District Court here also relied on *United States v. Seeger,* 380 U.S. 163 (1965) and *Welsh v. United States,* 398 U.S. 333 (1970), two draft law cases. These cases have the advantage at least of setting out the standards that the court purported to apply. From *Welsh*, at 398 U.S. 338:

> "But, having decided [in *Seeger*] that all religious con-

> scientious objectors were entitled to the exemption, we faced the more serious problem of determing which beliefs were 'religious' within the meaning of the statute."[7]

It is clear from *Welsh*, that the job of statutory construction became most difficult. Witness this language from *Welsh*, at 398 U.S. 341:

> "We think this attempt to distinguish *Seeger* fails for the reason that it places undue emphasis on the registrants interpretation of his own beliefs. The Court's statement in *Seeger*, that a registrant's characterization of his own belief as 'religious' should carry great weight, 380 U.S. at 184, does not imply that his declaration that his views are nonreligious should be treated similarly."

Indeed, in *Welsh* four Justices found it necessary to reach the constitutional claim of the Establishment Clause and, significantly, three of these Justices saw no violation of that Clause in finding that Welsh was not entitled to the religious exemption.

The Petitioners submit that much of the confusion in this area was settled by the Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a case ignored by the Courts here, although strenuously argued by Petitioners. The Court stated there, at 406 U.S. 215-216:

> "Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered

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[7] The precedential value of both *Seeger* and *Welsh* would seem to be lessened by the Court's statement in *Seeger*, at 380 U.S. 163 that:

> "In considering this question we resolve it solely in relation to the language of §6(j) [granting the exemption] and not otherwise."

> liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claim would not rest on a religious basis. Thoreau's choice was *philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clause."* (Emphasis supplied)

In *Yoder*, this court placed great emphasis on the traditionally strong State interest of providing education for the country's young. Consequently the Amish faced a burden in showing that they constitute a "religion" and are sincere in their beliefs. Orderly and uniform State administration of penal institutions has also traditionally carried forward a great State interest. Failure to require any substantial showing by the Respondents that they are a "religion" within the ambit of the First Amendment, while purporting to apply the standards, resulted here in a group which may or may not share some philosophical and personal values being denominated a "religion".

Petitioners similarly assert that Respondents were placed under no burden to prove the sincerity of their beliefs. The Court noted that "[in late 1971 or early 1972, Respondent Remmers was involved in the founding of a group known as T.R.U.T.H., an acronym for To Religious Understanding Through Hope. This organization, in which Respondent Loney was also involved, apparently functioned as an informal discussion group with religious overtones." (361 F.Supp. at 539) This was not, however, Respondent Remmers' testimony. At Tr. p. 121, the following appears:

> "Q. You stated on direct examination that about the same time Harry Theriault was beginning the Church of the New Song you were starting a movement entitled T.R.U.T.H., is that right?

"A. [Remmers] I was starting a church, not a movement. The Church was called The Religious Understanding to Hope, that's T.R.U.T.H.

"Q. In T.R.U.T.H., did you worship Eclat?

"A. [Remmers] No, not Eclat, not as that name."

The testimony makes clear that Respondent Remmers was well aware of the distinction that "movement" and "church" held in store for the Penitentiary and that T.R.U.T.H. was going to be denominated a "church".

Reverend Sherbourne Ray testified that Respondent Remmers approached him in late February or early March of 1972 and requested that he be allowed to hold meetings for T.R.U.T.H. but was told that no inmate meeting without outside sponsorship could be held. Approximately one month later, Respondent Remmers again approached Ray, but this time concerning the Church of the New Song (Tr. p. 205) Moreover, Respondent Remmers was well aware at that time of the requirement of outside sponsorship. (Tr. p. 114)

In *Wisconsin v. Yoder,* at 406 U.S. 235, the Court stated:

"Aided by a history of three centuries as an identifiable religious sect and a long history as a successful and self-sufficient segment of American society, the Amish in this case have convincingly demonstrated the sincerity of their religious beliefs, the interrelationship of belief with their mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization, and the hazards presented by the State's enforcement of a statute generally valid as to others."

The Respondents in this matter are aided by no criteria set out in *Yoder*. They stand or fall on their own bald assertions of sincerity. The District Court's failure to examine those assertions in light of the evidence of the "founding" of CNS at the Fort Madison Penitentiary meant that the District Court failed completely to scrutinize the Respondents' sincereity.

In addition to the conversation of Respondent Remmers at the Penitentiary, the testimony of Respondent Loney is significant. Prior to becoming affiliated with CNS, Respondent Loney had also been involved with T.R.U.T.H. Although he had trouble communicating with Respondent Remmers, he affiliated with CNS on the basis of mainly newspaper articles. (Tr. p. 26-27).

The District Court here, at 361 F.Supp. 542, stated:

> "Although prison authorities and reviewing courts may be naturally reluctant to believe in the sincere religious conversions of those whose past conduct would seem to make such events unlikely, there is simply insufficient evidence to support the contention that plaintiffs' beliefs are not sincere and genuinely felt."

The Court here, unlike the *Yoder* court, did not require any demonstration of sincerity of belief. Rather, the burden of proof was placed on the Petitioners to provide evidence to "support the contention that plaintiffs' beliefs are not sincere and genuinely felt." The court then compounded this error by misconstruing and failing to consider the evidence which was available concerning the "founding" of CNS at the Fort Madison Penitentiary.

B

RESPONDENTS' CONSTITUTIONAL RIGHTS ARE PROTECTED SINCE THE FOLLOWERS OF CNS ARE FREE TO HOLD THEIR BELIEFS, DISPLAY THEIR SYMBOLS OF MEM-

BERSHIP, CORRESPOND WITH OTHER BELIEVERS, AND ARE FREE TO RECEIVE THE SAME CHAPLAIN GUIDANCE AND SERVICES PROVIDED ALL NONCATHOLIC FAITHS OF INMATES AT THE IOWA STATE PENITENTIARY.

Even if it were found that the Church of the New Song is a legitimate religion subject to the guarantee of the Free Exercise Clause, the Court should further find that sufficient opportunity for Free Exercise exists at the Iowa State Penitentiary.

The Respondents are seeking the right to hold Church of the New Song meetings separate from all other religious groups at the Iowa State Penitentiary. The Respondents and their witnesses however were not completely clear about whether their "religion" could be considered a Protestant sect.

If the Church of the New Song is found to be a legitimate religion subject to the guarantee of free exercise, the Court must then decide whether the members have been allowed sufficient freedom to exercise their religion at Fort Madison.

The Respondents have been allowed to have Church of the New Song literature at the Penitentiary. In addition, they have been allowed correspondence with other alleged members outside the prison. The Respondents have, as was evident at the hearing, been allowed to wear "religious" insignia. In fact the Respondents have been allowed to practice their religion equally with all other religions at the Penitentiary except that they have not been allowed to meet separately and the chaplains have made no efforts to provide outside "clergymen" to the members. At the time of hearing, no documentation of ordination had been presented by ministers of the Church other than Respondent Loney's ordination by Respondent Remmers. Evidence of ministers in Iowa City, including a 12-year-old boy, was orally presented.

Reverend Ray, the chaplain at the Penitentiary, charged with coordinating all non-Catholic services, testified that if the Church of

the New Song were found to be a religion that he would assist its members the same as others. There is no evidence that the Church of the New Song, due to religious belief, need be treated any differently than other Protestant groups or need meet separately from them.

Evidence presented by the Respondents concerning the number of Church of the New Song members at the Penitentiary was inconclusive. A petition with 100 signatures stating the signers wish to attend meetings differs significantly from saying there are 100 members. A conclusion that the Church of the New Song is a legitimate religious sect also differs significantly from holding that they are therefore entitled to separate meetings. As was stated in *Sostre v. McGinnis,* 334 F.2d 906, 908 (2nd Cir. 1964):

> "Moreover, to concede that we are dealing here with a group which has some characteristics of a religious sect is separated by an enormous gap from the conclusion which the plaintiffs press upon us, the conclusion that since it is a religion this sect is subject to the same rules and regulations and must be treated in the same way as are Catholics, Protestants and Jews."

The Petitioners assert that they have provided opportunities for free exercise within the meaning of the First Amendment and that the Respondents, wanting more, have not accepted those opportunities. Chief Justice Burger, concurring in *Cruz v. Beto, supra,* stated:

> "There cannot possibly be any constitutional or legal requirement that the government provide materials for every religion and sect practiced in this diverse country. *At most,* Buddhist materials cannot be denied to prisoners if someone offers to supply them." (emphasis supplied)

Respondent Remmers admits that he did know what to say if the Baptists and the Methodists each wanted a chapel (Tr. 137), but the paramount thing the Church of the New Song seeks in bringing this lawsuit is a chapel where CNS can worship Eclat (Tr. 138).

The Respondents failed to show that they would be unable, either practically or due to religious belief, to freely exercise their "religion" within the existing administrative structure of religious services at the Iowa State Penitentiary.

CONCLUSION

It is of utmost importance that the proper standards be applied in determining what is a religion within the First Amendment and in determining the sincerity of the professors' belief as well as the manner of exercising beliefs in a maximum security penal institution.

There are over 600 inmates at the Iowa State Penitentiary at Fort Madison, Iowa, and, if the test of a religion applied here is allowed to stand, there would be unlimited potential fragmented beliefs for which the State would be required to furnish separately staffed meeting places. This, in the foreseeable future, could result in the extinction of religious programs for all in the institution.

Petitioners respectfully request that this Honorable Court grant this Petition for Certiorari for further consideration with due respect for the proper constitutional standards.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS.

APPENDIX A

Dr. Harry W. THERIAULT, Bishop, Church of the New Song of Universal Life, etc., et al., Plaintiffs-Appellees-Cross Appellants,

vs.

Norman A. CARLSON, Director, Bureau of Prisons, etc., et al., Defendants-Appellants-Cross Appellees (two cases).

Dr. Harry W. THERIAULT, Plaintiff-Appellant,

vs.

Frederick SILBER, Director, U.S. Chaplain Service, et al., Defendants-Appellees.

Nos. 72-2592 73-1182, 73-2183
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

June 10, 1974.

Consolidated appeals from the judgment of the United States District Court for the Northern District of Georgia, No. 72-2592, 339 F.Supp. 375, Newell Edenfield, Chief Judge, which ordered the Director of the Bureau of Prisons and the Director of Chaplaincy Services to direct prison authorities under their jurisdiction to grant petitioners the right to freely exercise their religion; from an order of the Northern District of Georgia, No. 73-1182, 353 F.Supp. 1061,

Newell Edenfield, Chief Judge, which found the Director of Bureau of Prisons and the Director of Chaplaincy Services to be in contempt of the prior order; and from an order of the United States District Court for the Western District of Texas, No. 73-2183, Ernest Guinn, J., which denied prison inmate's petition for evidentiary hearing on allegations of denial of right to practice religion. The Court of Appeals, Ainsworth, Circuit Judge, held that the cause No. 72-2592 would be remanded for an evidentiary hearing on issues of right to maintain action as class action and to determine whether the inmates' "Church of the New Song" or "Eclatarian" faith was entitled to the protection of the First Amendment; that the inmates were entitled to an evidentiary hearing in No. 73-2183, on issues of whether prison authorities were denying inmates the right to practice their religion; and that the court's findings in No. 72-2592 that the Director of the Bureau of Prisons and the Director of Chaplaincy Services were in civil contempt of the court's order were clearly erroneous.

No. 72-2592 vacated and remanded; No. 73-1182, vacated and remanded; No. 73-2183, reversed with directions.

Appeals from the United States District Court for the Northern District of Georgia and for the Western District of Texas.

Before BROWN, Chief Judge, and THORNBERRY and AINSWORTH, Circuit Judge:

AINSWORTH, Circuit Judge:

These three cases, consolidated for appeal, have as their central theme the alleged deprivation by certain federal prison authorities of the constitutional rights of prison inmates to practice their religious faith, known as the "Church of the New Song" or the "Eclatarian" faith. Harry W. Theriault, a federal prison inmate now serving sentences at LaTuna, Texas for various convictions, is the self-proclaimed founder, organizer, bishop, prophet and spiritual leader of

the Eclatarians, a group of prison inmates which progressively continues to increase in size as Theriault's various incarcerations increase geographically. His prison sojourns at the federal penitentiaries at Atlanta, Georgia and LaTuna, Texas generated incidents which form the basis of these three appeals which will be referred to herein as Theriault I, Theriault II and Theriault III.[1]

THERIAULT I—No. 72-2592

On June 18, 1970, "Dr. Harry W. Theriault" and a fellow inmate, "Reverend Jerry M. Dorrough," while incarcerated at the Atlanta, Georgia penitentiary, filed this "First Amendment Action" against the Catholic and Protestant chaplains at Atlanta, alleging various deprivations of their constitutional rights freely to practice their religion, seeking injunctive and other relief.[2] The complainants alleged that the Federal Government's use of taxpayers' money to compensate the chaplains for their services was violative of the Establishment Clause of the Constitution. They further alleged that members of their faith were being unconstitutionally denied the right freely to exercise their religion and that the actions of the chaplains in filing reports with the Parole Board relative to prisoners' participation or lack of participation in religious activities were

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We find it unnecessary for purposes of this appeal to give a detailed account of the origin and tenets of Theriault's newly created religion. The Eclatarian faith, or Church of the New Song, was originally founded by Theriault and Jerry M. Dorrough at the federal penitentiary at Atlanta, Georgia, allegedly as the result of visions experienced by Theriault at the Marion, Illinois federal penitentiary in which he received prophetic messages from "Eclat" informing him that he was the "Eclatarian Nazarite" and directing him to establish the Church of the New Song.

[2] Theriault acquired his Doctor of Divinity certificate through a mail order application. Theriault then, as self-appointed "Bishop of Tellus" ordained Dorrough First Revelation Minister of the Church of the New Song, conferring upon him on the day of the trial at the courtroom the degrees of Doctor of Divinity, Doctor of Philosophy and Bachelor of Philosophy.
The complaint as amended includes 164 additional fellow inmates as plaintiffs and was treated by the district judge as a class action.

violative of their First Amendment rights. Their complaint requested generally a recognition of their religion and the granting to them of the same prison religious privileges as those enjoyed by the Catholic and Protestant inmates.

Subsequent to the filing of this petition, Theriault was transferred to the federal penitentiary at Marion, Illinois, where because of his alleged threats to a correctional supervisor of violence upon being denied a place to hold religious services, he was placed in solitary confinement until he was returned to Atlanta in August 1971 for hearings on his June 18, 1970 petition. Extensive hearings were conducted in Atlanta in district court on three separate days during the latter part of 1971 and the early part of 1972 at which Theriault was both lead counsel and principal witness. "Bishop" Theriault and "Pope" Dorrough testified at length in regard to the source, history and tenets of the Eclatarian faith, acknowledging that Theriault had started it off as a game.[3] Nevertheless, the district judge refused to allow the Government to present expert testimony relative to the validity of the Eclatarian faith as a religion. At the trial much of the testimony pertained to attempts by Theriault and his fellow inmates to hold secret religious services. There was likewise testimony of violence and threats of violence by Theriault which allegedly caused prison officials to refuse him access to assembly rooms. At the conclusion of these hearings the district judge scheduled another hearing for additional testimony concerning the Government's representations of Theriault's tendency to violence, announcing, however, the court's intention to give Theriault a "trial run" on holding his religious services. At the final hearing at Atlanta, held in January 1972, several correctional officers and other prison officials from the Marion, Illinois penitentiary testified about various

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[3] Later, according to Theriault, when he realized he was affecting other people's feelings he started to get more sincere. When he and Dorrough decided to file this complaint they needed the proper caption. Dorrough came forward with this suggestion which they adopted: "You put yourself down, you be the head of the church, that's the Bishop, you put yours, and put me down as the First Minister."

threats by Theriault of mass violence, veiled threats of murder, actual physical assault and battery of prison officials, and destruction by Theriault of prison property. One such incident occurred on April 1, 1971, following a request by Theriault to use the chapel or auditorium for the purpose of honoring the birthday of St. Blanche, an Eclatarian saint. Theriault, an escape artist by his own admission, having several times broken away from federal custody, was considered by prison officials to be a high escape risk. Moreover, he and his followers were known troublemakers. Theriault was told of the prison policy requiring permission from the chaplain to secure a meeting place, as it was the chaplain's duty to coordinate religious activities. Theriault declined to follow instructions and announced his intention to hold the meeting, warning the prison authorities that if they used violence to break it up there would be bloodshed. Because of his threats, Theriault was placed in solitary confinement, to which he reacted by kicking the correctional supervisor. He later broke the bed from the cell wall, destroyed the toilet with a piece of angle iron, shoved the bed against the cell door and warned that he would kill anyone who attempted to enter.

The district court (Judge Edenfield) granted in part the relief requested by Theriault and issued the following order directed to respondents Hanberry and Beane, Protestant and Catholic chaplains, respectively; Carlson, Director, Bureau of Prisons; Silber, Director of Chaplaincy Services, Bureau of Prisons; and Henderson, Warden, Atlanta Penitentiary.

> "(1) Respondents Hanberry and Beane are enjoined from preparing or submitting oral or written reports to other staff members of the Atlanta federal penitentiary concerning the religious activities of individual inmates at that penitentiary;
>
> "(2) Respondent Carlson and Respondent Silber are ordered to direct prison authorities under their jurisdiction to grant petitioners the right to freely exercise their religion, including the right to correspond with petitioner Theriault for the purpose of seeking spiritual guidance. . . .

"(3) Respondent Henderson is hereby ordered to immediately release petitioner Theriault from confinement in punitive segregation and restore him to the general prison population; and

"(4) Respondent Carlson is hereby ordered to instruct prison authorities under his jurisdiction that they may not re-impose confinement in punitive segregation upon petitioner Theriault unless Theriault violates an institutional rule or regulation requiring such confinement subsequent to the date of this opinion and order or incites riot or insurrection during the conduct of his religious activities subsequent to the date of this opinion and order." [4]

Both the Government and Theriault appealed.

THERIAULT II—No. 73-1182

Subsequent to the Atlanta hearings Theriault was transferred to the federal penitentiary at LaTuna, Texas, on March 3, 1972, where he was again subjected to intermittent segregated confinement allegedly because of his disregard for prison security regulations and his renewed insistence, accompanied by physical violence, that he be allowed use of the prison chapel for religious services without prior approval of the prison chaplain. From LaTuna Theriault filed a petition in the United States District Court for the Western District of Texas seeking an evidentiary hearing in connection with allegations that his segregated confinement was punitive in nature, violative of Judge Edenfield's order (see Theriault I), that the prison chaplains at LaTuna were illegally reporting on his religious activities, and that the authorities at LaTuna were generally denying him religious privileges such as the rights to correspond with fellow members of the Eclatarian faith, to circulate among the prisoners, to obtain bibles peculiar to his sect, and to use the prison chapel. Theriault's petition was dismissed forthwith by the district court (Judge Guinn) on the day it was filed. Theriault appealed.

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[4] *See* Theriault v. Carlson, N.D.Ga., 1972, 339 F.Supp. 375.

THERIAULT III—No. 73-2183

Shortly after the filing of the petition with the Western District of Texas, Theriault, while still incarcerated at LaTuna, filed a motion with the district court at Atlanta alleging failure of respondents to comply with Judge Edenfield's previous order. A four-day evidentiary hearing was held resulting in a finding by the district judge that Directors Carlson and Silber were in contempt of his order in Theriault I.

The basis of the motion purportedly grew out of the failure of a prisoner incarcerated at Eglin, Florida, to receive a letter sent by Theriault in response to an injuiry about the Eclatarian faith. A four-day hearing was held. The Government admitted that Theriault's letter had not been delivered inasmuch as Elgin prison officials had not been informed of the court's order. The failure to so inform Eglin was based on the Government's belief that the court order applied only to the 166 petitioners to the original action, which petitioners were incarcerated at either LaTuna or Atlanta. A four-day hearing was held at Atlanta resulting in a finding of contempt against Directors Carlson and Silber. See Theriault v. Carlson, N.D.Ga., 1973, 353 F.Supp. 1061. The Government appealed.

Disposition of THERIAULT I

[1,2] The Government contends that Theriault I should be remanded in order that it may present evidence that the Eclatarian faith is nothing more than a disruptive, anti-authoritarian political movement and therefore not a bona fide religion entitled to the protection of the Constitution. The Government's attempt to present this proof through expert witnesses was rejected by the district court in both Theriault I and Theriault III. We find the unwillingness of the district court to hear evidence in this regard inexplicable considering the doubt entertained by it that the religion was nothing more than a game and since the proof adduced strongly suggests that petitioners are indeed so engaged. The testimony of Dorrough, co-founder of the

faith, may explain why some of the original followers, all incarcerated convicts, find the freedom-seeking sect attractive. He explained on direct examination:

> "In our Free Exercise Seminars, our revelation ministry is basically to destroy the Nicolaitans which we believe are the repressive rulers and the powercrats of the system. That means -- meaning the prison system, the people in the prison system, the people in the parole system, the people in government in general, the judiciary, et cetera. And we believe in destroying them or changing their minds with the power of our mouth."

First Amendment freedoms are not absolute. They are properly restricted when a sufficiently important governmental interest appears. United States v. O'Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968). The long list of court actions to which Theriault is a party, some of which are still pending, as well as the lengthy prison record which he has established over the years,[5] is strongly suggestive of the necessity of employing sharp and careful scrutiny of his activities, including his claim of religious sincerity. One of the tasks of the court "is to decide whether the beliefs professed by [petitioners] . . . are sincerely held and whether they are, in [their] own scheme of things, religious." *See* United States v. Seeger, 380 U.S. 163, 185, 85 S.Ct. 850, 863, 13 L.Ed.2d 733 (1965).[6] While it is difficult for the courts to establish precise

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[5] *See* Theriault v. United States, 8 Cir., 1968, 401 F.2d 79; Theriault v. United States, 5 Cir., 1968, 402 F.2d 792; Theriault v. United States, 5 Cir., 1969, 409 F.2d 1313; Theriault v. United States, 5 Cir., 1970, 434 F.2d 212; United States v. Theriault, 5 Cir., 1971, 440 F.2d 713; United States v. Theriault, 5 Cir., 1972, 467 F.2d 486; United States v. Theriault, 5 Cir., 1973, 474 F.2d 359; Theriault v. United States, 5 Cir., 1973, 481 F.2d 1193; United States v. Theriault, No. EP73-173 (W.D., Texas).

[6] The suggestion that we attempt now to establish precise standards is neither feasible nor practical.

standards by which the bona fides of a religion may be judged,[7] such difficulties have proved to be no hindrance to denials of First Amendment protection to so-called religions which tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity. *See, e.g.* United States v. Kuch, D.C., D.C., 1968, 288 F.Supp. 439.

[3] This matter is therefore remanded and the district court is directed to reopen these proceedings and permit the Government to present additional evidence in the fullest possible manner. On remand the court should allow the greatest liberality of proof and examine every aspect of the case. The court must also determine if this is in truth and in fact a class action in accordance with the rules pertaining thereto.

Disposition of THERIAULT II

[4] The Government concedes in its brief, at page 14, "that the decision of the United States District Court for the Western District of Texas (Theriault II) requires remand in order for that court to enter a full factual explanation of its rejection of Theriault's contentions." We agree that remand is proper under the circumstances and therefore vacate the order of dismissal entered by the district court and remand for a full evidentiary hearing.

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[7] In Wisconsin v. Yoder, 406 U.S. 205, 215-216, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972), in determining that the claims of the Older Order Amish religion for refusing to send their children to school after eighth grade rested on a religious basis, had this to say:

"Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests."

Disposition of THERIAULT III

[5] The district court's holding that respondents Carlson and Silber are guilty of a civil contempt is clearly erroneous and unsupported by the evidence. The record shows that Carlson and Silber attempted to comply with an order that was susceptible of misinterpretation.[8] Upon determining what was intended by the order they complied forthwith. We are convinced of their complete sincerity and good faith. The contempt finding by the district court was an abuse of discretion and must be reversed, annulled and set aside.

The district court's decision in Theriault I, No. 72-2592, is vacated and the cause is remanded for a full evidentiary hearing. In Theriault II, No. 73-1182, the district court's order is vacated and the cause is remanded for a full evidentiary hearing. In Theriault III, No. 73-2183, the district court's order is reversed, annulled and set aside.

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[8] Although the district court directed Carlson and Silber to order prison authorities *under their jurisdiction* to grant petitioners the right to correspond with petitioner Theriault, the opinion also shows that the "Eclatarian faithful, aside from one secretary, are to be found only in the federal penitentiaries of Atlanta and Marion." *See* Theriault v. Carlson, N.D.Ga., 1972, 339 F.Supp. 375, 377 n. 3. Under these circumstances the failure of respondents to inform prison authorities other than those at Atlanta and Marion was clearly an honest mistake. Apparently Judge Edenfield himself found his order wanting in clarity when in Theriault III, in rewriting parts of his order, he found it necessary to insert the word "all" before the term "prison authorities". *See* Theriault v. Carlson, N.D.Ga., 1973, 353 F.Supp. 1061, 1068.

APPENDIX B

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. _____

LOU V. BREWER, Warden at Iowa State Penitentiary, REV. SHERBOURNE RAY, Protestant Chaplain at the Iowa State Penitentiary; FATHER GERALD HOENIG, Catholic Chaplain at the Iowa State Penitentiary,

Petitioners,

vs.

MICHAEL D. REMMERS, Ordained Revelation Minister in the CHURCH OF THE NEW SONG, and Coadjutor of Local Purlieu T.R.U.T.H. and

ROBERT LONEY, Ordained Revelation Minister in the CHURCH OF THE NEW SONG and Special Envoy to the Bishop of Tellus,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

PROOF OF SERVICE — CERTIFICATE BY MEMBER OF SUPREME COURT BAR

I, Richard C. Turner, one of the attorneys for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 12th day of July, 1974, I served copies of the foregoing Petition for Certiorari, by mailing in a duly addressed envelope, with first class postage prepaid, to:

Mr. Robert Clinton
Mr. Robert Bartels
Mr. Barry Lindahl
University of Iowa
College of Law
Iowa City, Iowa 52242

COUNSEL FOR RESPONDENTS.

I further certify that all parties required to be served have been served.

R ICHARD C. TURNER
Attorney General of Iowa
State Capitol Building
Des Moines, Iowa 50319

COUNSEL FOR PETITIONERS.

FILED
JUL 30 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-2027

LOU V. BREWER, Warden at Iowa State Penitentiary, REV. SHERBOURNE RAY, Protestant Chaplain at the Iowa State Penitentiary; FATHER GERALD HOENIG, Catholic Chaplain at the Iowa State Penitentiary,

Petitioners,

vs.

MICHAEL D. REMMERS, Ordained Revelation Minister in the CHURCH OF THE NEW SONG, and Coadjutor of Local Purlieu T.R.U.T.H. and

ROBERT LONEY, Ordained Revelation Minister in the CHURCH OF THE NEW SONG and Special Envoy to the Bishop of Tellus,

Respondents.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX E 1c

[Certificate of Service]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO.

LOU V. BREWER, Warden at Iowa State Penitentiary, REV. SHERBOURNE RAY, Protestant Chaplain at the Iowa State Penitentiary; FATHER GERALD HOENIG, Catholic Chaplain at the Iowa State Penitentiary,

Petitioners,

vs.

MICHAEL D. REMMERS, Ordained Revelation Minister in the CHURCH OF THE NEW SONG, and Coadjutor of Local Purlieu T.R.U.T.H. and

ROBERT LONEY, Ordained Revelation Minister in the CHURCH OF THE NEW SONG and Special Envoy to the Bishop of Tellus,

Respondents.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

This supplement to Petition for a Writ of Certiorari is filed to rephrase the questions presented and to set forth in full the opinions below.

OPINIONS BELOW

Appended hereto as Appendices C and D respectively are the texts of the opinions of the United States Circuit Court of Appeals [494 F.2d 1277] and the District Court for the Southern District of Iowa [361 F.Supp. 537] which are cited on page two of the Petition for Certiorari.

REPHRASED QUESTIONS PRESENTED

1. WHETHER THE DISTRICT AND CIRCUIT COURTS ERRED IN FAILING TO APPLY THE CORRECT STANDARDS AS PRONOUNCED BY THIS HONORABLE COURT IN DETERMINING WHETHER THE CHURCH OF THE NEW SONG IS A VALID RELIGION FOR FIRST AMENDMENT PURPOSES AND IN DETERMINING WHETHER RESPONDENTS' BELIEFS ARE SINCERELY HELD.

2. WHETHER IN A MAXIMUM SECURITY CORRECTIONAL INSTITUTION, THE STATE OF IOWA IS REQUIRED UNDER THE FIRST AMENDMENT TO AFFORD SEPARATE MEETING PLACES TO ALL GROUPS CLAIMING TO BE A SEPARATE RELIGIOUS DENOMINATION.

Respectfully submitted,

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ATTORNEYS FOR PETITIONERS.

APPENDIX C

ORDER OF THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

Filed April 16, 1974

Michael D. REMMERS, Ordained Revelation Minister in the Church of the New Song and Coadjutor of Local Purlieu T.R.U.T.H.,

and

Robert Loney, Ordained Revelation Minister in the Church of the New Song and Special Envoy to the Bishop of Tellus, Appellees,

v.

Lou V. BREWER, Warden at Iowa State Penitentiary, et al., Appellants.

United States Court of Appeals.
Eighth Circuit.

Submitted Feb. 14, 1974.

Decided April 16, 1974.

Before GIBSON, STEPHENSON and WEBSTER, Circuit Judges.

PER CURIAM.

Brewer, Warden at the Iowa State Penitentiary, et al., appeal from a decision and order of the district court holding that the Church of the New Song is a religion within the ambit of the First Amendment and ordering that officials of the penitentiary shall grant to the members thereof the right to exercise their religion equally with other religions. Michael D. Remmers, et al., cross appeal from that portion of the district court's decision refusing to restrict the activities of the chaplains in the parole process. The decision and order of the district court is reported at 361 F.Supp. 537 (S.D.Iowa 1973). We affirm.

Appeal

Appellants in substance contend (1) The Church of the New Song is not a religion; (2) appellees' religious beliefs are not sincerely held; (3) even if the court should find that the Church of the New Song is a religion subject to the guarantee of the Free Exercise Clause, the court should further find that opportunity for Free Exercise exists at the Iowa State Penitentiary.

After careful consideration of the entire record we are satisfied that the district court's judgment that The Church of the New Song is a religion within the ambit of the First Amendment is based on findings that are not clearly erroneous and that no error of law appears. Further there is insufficient evidence in this record to establish appellants' contention that appellees' beliefs are not sincere and genuinely felt.[1] It also appears that appellees have not been allowed a fair and meaningful opportunity to freely exercise their religion in the same degree as other inmates, Protestant and Catholic. The district court's order requiring that this situation be corrected is affirmed.

Cross Appeal

Remmers, et al., contend that the prison chaplains' involvement in the parole decision making process, implicitly encourages inmates to participate in religious activities and thereby has the primary effect of aiding religion. It is urged that the present system has the effect of advancing the Christian religion and inhibiting non-christian religions and thereby violates the Establishment Clause.

The district court found that "The involvement of the chaplains in the parole process at Fort Madison is neither direct nor substantial"; the mere fact that chaplains are allowed to submit

[1]. As the trial court noted, should it subsequently appear that the Church of the New Song is a hoax and front, as claimed by the state, that eventuality can be dealt with by both the prison administration and the court.

oral or written reports or letters to the Diagnostic Committee[2] or serve thereon was insufficient in itself to establish a violation of the First Amendment.

The record discloses that the seven-member Review Committee meets in groups of three when interviewing prospective parolees. The reports prepared by the chaplains to the committee were not shown to have dealt solely or primarily with religious activities or the lack thereof. There was no showing that religion was being favored in the parole process.

We recognize that this is a sensitive area. Great care must be exercised to avoid even the appearance of reliance on "religious reports" as determinative of one's status for parole eligibility. The trial court probed this area very carefully, supplementing counsel's questioning of witnesses.

After reviewing this record we conclude the trial court did not err in determining that the involvement of the chaplains in the parole process at the penitentiary has not been shown to be improper or a violation of the Establishment Clause.

Affirmed.

2. Prison officials testified that the committee is more properly termed the Classification and Review Committee. It has numerous duties which include evaluating the information compiled by a counselor upon the reception of an inmate; determining proper goals and setting security classification and limitations for the inmates after the counselor has made a recommendation on treatment needs; transfer recommendations; reclassifications and recommendation for work release or parole consideration. In general the inmates' counselor (not a chaplain) compiles the information which is presented to the committee. Chaplains' reports are a part of the material submitted to the committee.

APPENDIX D
ORDER OF THE UNITED STATES DISTRICT COURT

Filed July 24, 1973

Michael D. REMMERS and Robert Loney, Plaintiffs,

v.

Lou V. BREWER, Warden, et al., of the Iowa State Penitentiary at Fort Madison, Iowa, Defendants.

Civ. No. 72-177-2.

United States District Court,
S. D. Iowa. C. D.

July 24, 1973.

MEMORANDUM AND ORDER.

HANSEN, Chief Judge.

This is an action brought under 42 U. S. C., Section 1983 by two inmates of the Iowa State Penitentiary at Fort Madison, Iowa, against the Warden and other prison officials. Petitioners aver that as members of the Church of the New Song they are being denied the right to practice their religion in violation of the First Amendment. They furthermore claim that certain practices of the prison's Diagnostic Committee, which makes recommendations to the Parole Board, violate the Establishment Clause of the Constitution.

FINDINGS OF FACT

There is no substantial dispute between the parties concerning the facts which gave rise to this controversy. Plaintiffs Michael Remmers and Robert Loney are both presently incarcerated at the Iowa State Penitentiary, a maximum security institution operated by the State of Iowa. Defendant Brewer is the warden at the prison. Defendant Ray is the Protestant chaplain at Fort Madison and defendant Hoening is the Catholic chaplain. The two chaplains have primary responsibility for conducting religious programs at the prison, subject to the review by the warden. Both chaplains are

also members of the prison's Diagnostic Committee, which is composed of seven members of the prison supervisory staff. The Diagnostic Committee meets in rotating groups of three to meet with and interview prisoners prior to their appearance before the Parole Board. Following these interviews, the Diagnostic Committee submits reports to the Parole Board with recommendations as to the prisoner's suitability for parole. It is this participation by the chaplains in the parole process which petitioners claim violates the First Amendment.

In late 1971 or early 1972, plaintiff Remmers was involved in the founding of a group known as T.R.U.T.H., an acronym for To Religious Understanding Through Hope. This organization, in which plaintiff Loney was also involved, apparently functioned as an informal discussion group with religious overtones. Shortly after the founding of T.R.U.T.H., Remmers approached Reverend Ray on behalf of the group and requested permission to hold formal meetings and use prison facilities. This request was denied by Reverend Ray because he felt that T.R.U.T.H. was not a "recognized" religion and had no established counterpart or sponsor outside the prison.

Sometime after this encounter, Remmers and other T.R.U.T.H. members became acquainted with an order known as the Church of the New Song and the teachings of its founder, one Harry Theriault. Following this acquaintanceship, Remmers, Loney, and a number of other inmates became members of the Church of the New Song and carried on correspondence with Bishop Harry Theriault and other Church of the New Song functionaries. Remmers and Loney then again approached Reverend Ray and Father Hoenig. They expressed their belief in the Church of the New Song and indicated to both chaplains that a sizeable number of inmates were interested in the new faith. Their request for meeting facilities and formal scheduling of Church of the New Song activities was denied by the chaplains with the explanation that the church was not a recognized religion. Plaintiffs then pressed their cause directly to Warden Brewer, presenting to him a petition with some 102 signatures of inmates purportedly interested in possibly attending Church of the New Song services. Their request was again denied on the grounds that

the Church of the New Song was not a recognized or genuine religion. Plaintiffs claim that the failure of prison authorities to accommodate their beliefs by granting them facilities and time to practice their religion violates rights guaranteed to them under the First Amendment.

Plaintiffs filed a *pro se* complaint in this Court on August 3, 1972, seeking the following relief: (1) That Warden Brewer be ordered to allow the Church of the New Song membership to fully practice their religion by (a) gathering together for religious meetings and services, (b) receiving and possessing religious literature, (c) being allowed to study and discuss Church of the New Song precepts, (d) being allowed to correspond with other members of their faith; (2) That Warden Brewer be ordered to direct all prison personnel to grant the above rights to Church of the New Song members; (3) That the prison chaplains be enjoined from participating in any manner in Diagnostic Committee interviews or reports which may affect parole eligibility; (4) That the two chaplains be enjoined from submitting oral or written reports to the Diagnostic Committee concerning the religious activities of inmates.

Petitioner's cause was tried to the Court on February 22, 1973 and February 23, 1973. Besides the plaintiffs themselves, three other Church of the New Song members testified on their behalf: Coadjutor Richard Tanner, International Ambassador Becky Hansley, and Dr. Stephen Fox, a professor of Psychology for the University of Iowa. The defense presented as witnesses Warden Lou Brewer, the defendant Reverend Ray, and James Riggsby, a program director at the U.S. Federal Penitentiary in Atlanta, Georgia, where the Church of the New Song was apparently founded.

IS THE CHURCH OF THE NEW SONG A RELIGION?

The threshold determination to be made in this case concerns whether or not the Church of the New Song is a religion so as to come under the protection of the First Amendment. This question has previously been considered by a federal court in Theriault v. Carlson, D.C., 339 F.Supp. 375 (1972). *Theriault* involved

constitutional claims and issues substantially similar to the present case. Inmates at the Atlanta federal pentitentiary claimed that as Church of the New Song members they were being denied the right to freely and meaningfully practice their religion in violation of the First Amendment. The prison authorities defended their actions by asserting that the Church of the New Song was merely a sham and a front to disguise disruptive or revolutionary activities. Since the Church of the New Song had been founded by an inmate at the Atlanta penitentiary, Bishop Harry Theriault, the court in Theriault v. Carlson was in a quique position to review at first hand the foundations and activities of this new faith. The court there concluded that the Church of the New Song was a religion and as such was entitled to the full protections of the First Amendment. After a careful review of the evidence presented at the trial of this cause, this Court agrees with the conclusion of Judge Edenfield in Theriault v. Carlson.

In the first instance, the Court notes that the preferred position of religious freedoms in our constitutional plan demands that a federal court view religious claims with great solicitude lest these vital freedoms be extinguished. Nor is the Court lightly disposed to overturn the finding of a sister court, particularly where that court had the advantage of perspective enjoyed by the court in Theriault v. Carlson, *supra*.

The term "religion" is not defined in the Constitution. Indeed, a succinct and comprehensive definition of that concept would appear to be a judicial impossibility. The relatively few cases dealing with the subject indicate, however, that the concept is to be given a wide latitude in order to insure that state approval may never become a prerequisite to the practice of one's faith. See Fulwood v. Clemmer, D.C., 206 F.Supp. 370 (1962); Theriault v. Carlson, *supra*. See also United States v. Seeger, 380 U.S. 163, 177, 85 S.Ct. 850, 13 L.Ed. 2d 733 (1965); Walsh v. United States, 398 U.S. 333, 90 S.Ct. 1792, 26 L.Ed.2d 308 (1970).

The testimony at the trial of this cause adduced a great deal of information concerning the foundations and precepts of the Church of the New Song, much of which is contained in Theriault v. Carlson, *supra*, and need not be reiterated here. What the

testimony did show, however, is that the Church of the New Song qualifies as a religion even under a narrow construction of that term.

The primary bond between Church of the New Song members appears to be their belief in an inanimate and supreme force or spirit called Eclat, which they believe pervades all things. The Eclatarians apparently believe that Eclat is a unifying and harmonizing spirit which unites all men in brotherhood. Thus Eclat may be seen to occupy roughly the same relative position in the Eclatarian faith as the Christian God or Hinduism's Brahma. Eclatarians view Jesus and other Christian figures as great teachers and spiritual leaders who are nontheless subordinate to Eclat. Thus plaintiffs do not feel that they are a Christian sect or that their religious needs can be fulfilled under the existing opportunities for Protestant or Catholic services. Important writings in the Eclatarian faith include the Bible and series of "Demandates" and "Exegetic Missives" issued by the spiritual leader of the faith, Bishop Harry Theriault. These latter writings have been included in a volume or Eclatarian Bible which serves as the primary source of Eclatarian teachings.

The testimony of Richard Tanner and Becky Hensley showed that the Eclatarian movement is no longer confined only to the inmates of two federal penitentiaries, as was the case when the *Theriault* opinion was written. Rather, the Church of the New Song appears to have spread both within and without penal institutions across the country. According to the testimony of Miss Becky Hensley, International Ambassador of the Church of the New Song, the church has established purlieus (congregations) not only in Fort Madison and Iowa City, Iowa, but in many other states. Furthermore, it was evident to the Court that non-convicts as well as state and federal prisoners are now members of the Church of the New Song. Dr. Stephen Fox, a member of the church and a professor of psychology, testified as to the rehabilitative effects of Eclatarianism on prison inmates in particular and on people in general. The therapeutic value of Eclatarianism was enunciated by Richard Tanner, Special Envoy to the Bishop of Tellus (*i.e.*, Harry Theriault) and a National Co-Adjutor of the Church of the New Song.

While there is no recognized body of dogma for the Eclatarian faith and each member of the Church is apparently free to embrace or reject whatever portions of Eclatarian teaching he or she wishes, the only absolute requirement for membership being a firm belief in Eclat. There was no evidence that any of the tenets of Eclatarianism, such as they may be, includes calls to violence or defiance of authority. Nor was there any evidence presented linking the religious activities of Church of the New Song members at Fort Madison to disruptions or disturbances at the prison.

Although much of the precise meaning of Eclatarianism may escape the Court, and no matter how strange or bizarre its origins and fundamentals may appear to some, it is beyond serious doubt that it possesses many of the characteristics associated with traditional "recognized" religions. The state has not shown the insincerity or fraudulent nature of the petitioners' professed beliefs. Even without the precedential weight of the *Theriault* decision, the Court would be constrained to find that the Church of the New Song at this time constitutes a religion entitled to the protection of the First Amendment.

The state does not appear to deny this conclusion directly, but argues that in a prison context some initial showing of legitimacy is required for administrative purposes before a group alleging to be a religion is entitled to the protection of the Free Exercise Clause. In support of this position, the state relies on Long v. Parker, 390 F.2d 816, 820 (3rd Cir. 1968); Banks v. Havener, D.C., 234 F.Supp. 27, 29 (1964), and Sostre v. McGinnis, 334 F.2d 906, 908-909 (2d Cir. 1964). Without reviewing the particular statements in these cases from which the state's argument is drawn, it suffices to say that they cannot begin to support the broad and novel principle that is proposed. Moreover, the state's argument suggests that prison administrators have the power to decide which religions are "recognized" and legitimate and which are not. Such a notion strikes directly at the freedom from governmental approval of secular religion which is at the core of the First Amendment's Establishment Clause. See *e.g.* Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). Apart from the fact that the petitioners here have plainly made a *prima facie* showing of legitimacy, the requirement proposed by the state is patently

unsound and cannot stand. The Court is not insensitive to the problems of a prison administrator faced with a profusion of religious claims by those whose faith may appear both strange and incomprehensible, if not downright false and insincere, but that concern cannot justify a voyage into the uncharted hazards of religious censorship. It is neither for a court or a governmental official to rule on the truth or falsity of a religious faith. Such questions are clearly placed beyond the pale of governmental official to rule on the truth or falsity of a religious faith. Such questions are clearly placed beyond the pale of governmental decision-making by the First Amendment. The only appropriate and relevant inquiry is whether or not the Church of the New Song is a religion and whether the plaintiffs possess a sincere and good faith belief in that creed. United States v. Ballard, 322 U.S. 78, 64 S.Ct. 882, 88 L.Ed. 1148 (1944); United States v. Seeger, *supra*.

Although prison authorities and reviewing courts may be naturally reluctant to believe in the sincere religious conversions of those whose past conduct would seem to make such events unlikely, there is simply insufficient evidence to support the contention that plaintiffs' beliefs are not sincere and genuinely felt.

For all the above-mentioned reasons, the Court finds that the Church of the New Song is a religion within the ambit of the First Amendment.

Given these findings, the plaintiffs' remedy at law is clear. When the state seeks to justify the granting or withholding of benefits and privileges based on religious classifications, the Equal Protection Clause of the Fourteenth Amendment demands that the state present a compelling interest which is served by the discrimination.[1] Sherbert v. Verner, 374 U.S. 398, 406, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). The principle is equally applicable in

[1] It is probable that the result in the instant case would also be demanded by the principle of government neutrality in religious affairs, wherein the state may not favor one religion over the other, or non-religion over religion. See Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

a prison setting. Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); United States ex rel Jones v. Rundle, 453 F.2d 147 (3rd Cir. 1971); Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971). The state has not suggested nor does the Court perceive any compelling state concern which is forwarded by denying to Church of the New Song members the same rights of assembly and worship enjoyed by Protestant and Catholic inmates. It follows that the present non-recognition of the Church of the New Song is unconstitutional. Plaintiffs must be allowed the same rights of assembly, discussion, correspondence, ministerial visits, devotional facilities, etc. which are enjoyed by Protestant and Catholic inmates. See Theriault v. Carlson, *supra;* Fulwood v. Clemmer, *supra;* and Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967). Of course the privileges allowed Church of the New Song devotees need only be substantially, not literally, equivalent. Prison authorities may properly take into account distinguishing factors such as the size of the group in providing facilities. Church of the New Song members are also subject to the same lawful orders and regulations concerning the internal affairs of the prison as other inmates. What is demanded is the Eclatarians be allowed a fair and meaningful opportunity to freely exercise their religion in the same degree as other inmates, Protestant and Catholic.

The Court is well aware of the possibility that the Church of the New Song may be only a sham religion created to serve as a convenient vehicle for the presentation of political claims. But the as yet unsubstantiated anxieties of this Court cannot justify the possible suffocation of religious freedoms. If the Church of the New Song should prove to be a hoax and front that the state claims it is, that eventuality can be dealt with by both the prison administration and this Court. Nor should it be thought that by granting the Eclatarians religious rights the prison administration is laying itself open to uncontrollable hazards. The prison administration has a strong interest in seeing that the facilities and benefits enjoyed by the Church of the New Song are not abused or used for other than religious purposes. Meetings can be observed or mail monitored to see that this is the case. Given the power vested in prison authorities to take reasonable precautions to prevent potential abuses, any phoney believers should find their jest most unrewarding. See Knuckles v. Preasse, 302 F.Supp. 1036

(E.D.Pa1969), affirmed 435 F.2d 1255 (erd. Cir. 1970), cert. den. 403 U.S. 936, 91 S.Ct. 2262, 29 L.Ed.2d 717 (1971) for a discussion of this problem.

THE DIAGNOSTIC COMMITTEE ISSUE

Petitioners allege that the participation by chaplains Ray and Hoenig in the Diagnostic Committee, whereby they may be called upon to submit reports to the Parole Board concerning an inmate's suitability for parole, violates the Establishment Clause of the Constitution.

Certainly the Constitution does not bar the State from providing chaplains in prisons for the spiritual edification of the inmates, so long as no particular religion is fostered thereby. Abington School Dist. v. Schempp, 374 U.S. 203, 296-299, 83 S.Ct. 1560, 1610; 10 L.Ed.2d 844 (1963) (concurring opinion Mr. Justice Brennan); Theriault v. Carlson, supra, 339 F.Supp. at 381; Horn v. People of California, 321 F.Supp. 961, 964 (E.D.Cal.1968). But plaintiffs claim that the submission of parole suitability reports by the chaplains here, whether written or oral, illegally entangles church and state and may influence the inmates' choice of religious activity. The argument essentially is that an inmate desiring a favorable report to the Parole Board may engage in religious services and activities which he would not otherwise take part in.

The involvement of the chaplains in the parole process at Fort Madison is neither direct nor substantial. Since the seven-member Diagnostic Committee meets in groups of three when interviewing prospective parolees, it is doubtful that a chaplain is always on the interviewing team. Nor is it established that the reports prepared by the chaplains deal solely or primarily with religious activities or lack thereof. The Court can find no basis to ban a person from sitting on any public body merely because he is a member of a particular religion or even a minister of that religion. In fact, the Court suspects that most members of public agencies or bodies are members of a particular religion.

If evidence were before the Court that a man's religious activities were determinative of his status of parole eligibility, this would cause concern to the Court if it evolved from the

involvement of the chaplains in the parole process. Under this factual setting, there might be a violation of the First Amendment rights of an inmate seeking parole. The mere fact, however, that a Methodist, Catholic, Jew, Buddhist, Eclatarian or person of any other religion sits on a particular board or committee cannot establish a violation of the First Amendment.

The Court also concludes that allowing these chaplains to submit oral or written reports or letters to the Diagnostic Committee does not violate the First Amendment unless it is established that a particular religion is fostered thereby. There is no evidence that an Eclatarian minister may not submit letters or reports to this Diagnostic Committee or that a minister of any faith may not submit information he desires about a particular inmate for any consideration of the Diagnostic Committee and Parole Board. The Court does not feel that the plaintiffs have made an adequate showing that a particular religion is being favored in the present parole process or that the involvement of the chaplains in the parole process at the Penitentiary is otherwise improper.

ORDER FOR JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law stated herein, it will be ordered that the defendants shall grant to the Church of the New Song members at the Fort Madison Penitentiary the right to exercise their religion equally with other religions. It will be further ordered that the portion of the cause of action seeking to restrict the activities of the chaplains in the parole process is dismissed.

It Is Ordered that the above shall constitute the Findings of Fact, Conclusions of Law, and Order for Judgment in this cause of action.

APPENDIX E

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

LOU V. BREWER, Warden at Iowa State Penitentiary; REV. SHERBOURNE RAY, Protestant Chaplain at the Iowa State Penitentiary; FATHER GERALD HOENIG, Catholic Chaplain at the Iowa State Penitentiary,

Petitioners,

vs.

MICHAEL D. REMMERS, Ordained Revelation Minister in the CHURCH OF THE NEW SONG, and coadjutor of Local Purlieu T.R.U.T.H. and

ROBERT LONEY, Ordained Revelation Minister in the CHURCH OF THE NEW SONG and Special Envoy to the Bishop of Tellus,

Respondents.

AMENDED PETITION FOR A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PROOF OF SERVICE - CERTIFICATE BY MEMBER OF SUPREME COURT BAR

I, Lorna Lawhead Williams, one of the attorneys for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the _____ day of July, 1974, I served copies of the foregoing Supplement to Petition for Writ of Certiorari by mailing in a duly addressed envelope, with first class postage prepaid, to:

Mr. Robert Clinton
Mr. Robert Bartels
Mr. Barry Lindahl
University of Iowa
College of Law
Iowa City, Iowa 52242

COUNSEL FOR RESPONDENTS.

I further certify that all parties required to be served have been served.

LORNA LAWHEAD WILLIAMS
Special Assistant Attorney General
State Capitol Building
Des Moines, Iowa 50319

COUNSEL FOR PETITIONERS.